

Jay Zischke, 4/17/2006

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE WESTERN DISTRICT OF WASHINGTON  
3                   AT SEATTLE

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5                   UNITED STATES OF AMERICA,

6                   et al.,

7                   Plaintiffs,

8                   vs.

9                   STATE OF WASHINGTON, et al.,

10                  Defendants.

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11                   DEPOSITION UPON ORAL EXAMINATION  
12                   OF  
13                   JAY ZISCHKE  
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15  
16                   8:55 a.m.

17                   April 17, 2006

18                   900 Fourth Avenue 2000  
19                   Seattle, Washington 98164

20  
21                   JACQUELINE L. BELLOWS  
22                   CCR 2297

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1 submitted it specifically in reference to a  
2 road-improvement project that appeared to be in the same  
3 location. And they said they would keep it in their  
4 database, is what I recall.

5 Q Okay. Let me hand you what had been marked as Exhibit 4  
6 to your deposition. Do you recognize that?

7 A Uh-huh. Yes, I do.

8 Q Before we dig through the copies, does that exchange  
9 refer to the culvert that you were just testifying  
10 about?

11 A I've got to grab my glasses.

12 Q Oh, sure.

13 MR. SLEDD: While he's reading that, do you  
14 have copies?

15 MR. DIETRICH: Yeah, we do.

16 MR. STAY: Thank you.

17 MR. HOLLOVED: Thanks.

18 THE WITNESS: Yes.

19 Q (By Mr. Dietrich) So that Exhibit 4 is a series of  
20 e-mails between you and some DOT staff?

21 A Correct.

22 Q And the subject of those e-mails is the Delate Creek  
23 culvert?

24 A As well as two other culverts in the immediate vicinity.

25 Q Okay. And what are those two culverts?

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1 A Well, they're both conduits which pass streams  
2 underneath State Route 305. One is referred to -- do  
3 you want the WRIA number? Would that be helpful?

4 Q Sure.

5 A The Delate Road Creek I was speaking of is WRIA 150291.  
6 And a stream just west of that called Bjorgen Creek,  
7 B-J-O-R-G-E-N, is WRIA 150290. That's also a hanging  
8 culvert. So the distance between the bottom of the  
9 culvert and the creek is three to four feet, again. And  
10 the third stream furthest eastward does not have a name,  
11 and its WRIA number is 150293.

12 Q Do you know if those three culverts are contained in the  
13 DFW-DOT inventory of identified fish passage barriers?

14 A I do not.

15 Q Did the DOT folks that you were corresponding with tell  
16 you that they would include those culverts in the  
17 inventory?

18 A I don't recall. I could read this. Would you like me  
19 to read it?

20 Q You don't have any independent recollection, other than  
21 what's in the e-mail?

22 A No, I don't.

23 Q Okay. No, I don't need you to read it.

24 All right. Do you know whether the DOT has any  
25 projects planned to correct any of those three culverts

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1 that are discussed in Exhibit 4?

2 A I do not.

3 Q Did you -- did you disagree with the DOT's proposed --  
4 the way it -- were you dissatisfied in any way with the  
5 way the DOT responded to your concerns?

6 A As a fisheries scientist, I was disturbed that we  
7 weren't able to at least address the further westerly  
8 culvert, which was in close proximity to the project  
9 that was being proposed.

10 Q And just so we're clear for the record, which is the  
11 further westerly culvert?

12 A 150290.

13 Q Did they tell you why they couldn't address that culvert  
14 as part of their project?

15 A I don't remember specifically what the reasoning might  
16 have been.

17 Q All right. Well, we just discussed three examples of  
18 barrier culverts in the east Kitsap area. Are there  
19 others that you anticipate testifying about at trial?

20 A None that I have a specific location for yet.

21 Q Let me hand you what's been marked as Exhibit No. 1, and  
22 just take a second to read that while we give copies to  
23 counsel here.

24 MR. STAY: Does it have an exhibit number?

25 MR. DIETRICH: One.

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1 Wright Creek was identified as a barrier during the  
2 course of your survey? Do you recall what -- strike  
3 that.

4 What was it about this Wright Creek culvert that  
5 led you to believe it was a barrier to fish passage?

6 A The observation that the downstream end of the culvert  
7 is perched -- and I'll speculate here -- at a mean high  
8 tide level. I don't exactly know the tidal elevation.  
9 But it is a concrete box that comes out of the roadbed,  
10 and is only accessible to saltwater at certain tide  
11 elevations.

12 Q Did you identify any adult salmon upstream of that  
13 particular culvert during the course of the survey?

14 A Yes.

15 Q So what does that indicate to you?

16 A It indicates fish can pass at some tidal elevations.

17 Q So would you characterize that particular culvert as a  
18 partial barrier?

19 A Yes.

20 Q Okay. And what did you do -- I know you talked about  
21 Exhibit 2, which was the e-mail from the DOT. Do you  
22 recall how the DOT resolved your concerns about that  
23 particular culvert?

24 A My recollection is that this is the only correspondence  
25 I had with them. Following the phone inquiry was this

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1 response to that issue.

2 Q Do you know whether the Wright Creek culvert has been  
3 placed on the barrier inventory?

4 A No.

5 Q When you have a culvert such as this one that you  
6 express concerns about, do you routinely follow-up with  
7 the agency or with the land owner at some later date?

8 A Not routinely. I think it varies depending on the  
9 situation.

10 Q In what situations would you tend to follow up with the  
11 land owner?

12 A For a culvert or passage problems that are severe or in  
13 my perspective need to have a remedy more immediate than  
14 a list, then we tend to be persistent about those and  
15 try to follow up as many times as necessary.

16 Q Okay. So can I assume then that the Wright Creek  
17 culvert wasn't a problem that you viewed as a high  
18 priority?

19 A Yes.

20 Q Let me refer you back to Exhibit 1 just for a moment and  
21 have you take a look at the second bullet.

22 A Uh-huh.

23 Q And that bullet refers to a limiting-factors analysis?

24 A That's correct.

25 Q Can you tell me what a limiting-factors analysis is.

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1 culverts?

2 A Yes.

3 Q Do you have other photographs depicting barrier culverts  
4 owned by the State of Washington?

5 A I'd have to research that. I'm not sure.

6 Q All right. We'll follow up with counsel. But if you do  
7 have those, we'd like to have them.

8 A "Those" being?

9 Q The photographs of state-owned barrier culverts.

10 Okay. And --

11 A I was just hesitating. I was trying to think if we'd  
12 taken pictures of Wright Creek. I can't recall off the  
13 top of my head.

14 Q Well, I can represent to you these were all we were able  
15 to identify that had been produced so far by the tribe.  
16 So, now we have spent the last half hour or so talking  
17 about several examples of the state-owned barrier  
18 culverts in the east Kitsap area. Are there others that  
19 you're aware of, other than the ones we've just been  
20 talking about?

21 A In the east Kitsap area?

22 Q Yes. And actually, let's strike that yes.

23 Are there other state-owned barrier culverts other  
24 than the ones we've just been discussing that you intend  
25 to talk about as examples during your trial testimony?

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1 A Yes.

2 Q Okay. I'd like to talk about those now. Can you  
3 identify those culverts for me.

4 A At this time I don't have a list of culverts to share  
5 with you. Still working on the details of specific  
6 culverts to present.

7 Q Let me hand you . . .

8 [Deposition Exhibit No. 6 marked.]

9 Q (By Mr. Dietrich) Mr. Zischke, let me hand you what's  
10 been marked as Exhibit 6 to your deposition. And I'll  
11 represent to you that is an excerpt from the Tribes'  
12 Responses to the State's First Request For Production.  
13 And I'll also represent to you that that was identified  
14 as a portion of that response that was prepared by the  
15 Suquamish Tribe. If you could take a look at  
16 Interrogatory No. 2 and read that to yourself and then  
17 read the response to yourself . . .

18 A [Witness complies.]

19 Q Did you have a chance to read that?

20 A I did.

21 Q Were you the person that provided the response to  
22 Interrogatory No. 2 on behalf of the Suquamish?

23 A One of the people.

24 Q There's a list of 14 culverts under the heading  
25 "Suquamish." Is that -- are those the -- is that the



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1 entire list of state-owned barrier culverts that the  
2 Suquamish has identified?

3 A Referring to Interrogatory No. 2? Yes.

4 Q Yes.

5 And are you aware of other barrier culverts that  
6 aren't on this list? That's state-owned barrier  
7 culverts.

8 A In the Puget Sound, yes.

9 Q In -- well, let me ask you this: What was the  
10 geographic area that's covered by the list that you  
11 submitted in Response to Interrogatory No. 2?

12 A The effort within the fisheries department was to  
13 respond in a relatively narrow geography covering the  
14 east Kitsap peninsula primarily, areas that we were most  
15 familiar with.

16 Q Okay. Let's stick with the east Kitsap peninsula then.  
17 Are there barriers in the east Kitsap peninsula owned by  
18 the State of Washington other than those depicted in  
19 your response to Interrogatory No. 2?

20 A I don't think so. Although, I'd have to go back and  
21 look specifically at the location of some of these. For  
22 example, No. 1, I'm not exactly sure what we're  
23 referring to there.

24 Q Okay. So is it fair to say that all of the examples of  
25 barrier culverts that you would testify about in the

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1 east Kitsap area are contained in this list of 14  
2 culverts?

3 A Yes.

4 Q Now, you mentioned a couple other geographic areas that  
5 you might provide examples about. And one was, I think,  
6 the Hood Canal area. Can you identify for me specific  
7 state-owned barrier culverts that you would testify  
8 about in the Hood Canal area?

9 A No, not at this time.

10 Q Okay. Then you also talked about the eastern edge of  
11 the Straights of Juan De Fuca. Are there -- well, let  
12 me ask it this way: Are there barrier culverts in areas  
13 outside of the east Kitsap peninsula that are owned by  
14 the state that you can tell us about today that you  
15 intend to testify about?

16 A No.

17 Q Are you familiar with the process that the Department of  
18 Fish & Wildlife uses to inventory potential barrier  
19 culverts?

20 A Superficially.

21 Q Do you have any disagreement with that approach?

22 A To the extent I'm aware of it, no.

23 Q Are you aware of the methodology that the Department of  
24 Fish & Wildlife uses to assess habitats associated with  
25 barrier culverts?

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1           you including those in your land use?

2       A     Those are land-use decisions.

3       Q     Okay. With respect to the east Kitsap area, then, are  
4           you able to rank those five -- I'm sorry, four --  
5           human-controlled factors in order of importance?

6       A     Not with any degree of accuracy, no.

7       Q     Okay. Do you have an opinion where barrier culverts  
8           would -- within the subcategory of land-use-type issues,  
9           do you have an opinion where barrier culverts would fall  
10          in order of importance with respect to the east Kitsap  
11          area?

12      A     Again, it's difficult to assess that geographically in a  
13          broad sense. Drainage by drainage you can be more  
14          specific. Some drainages have culverts that are located  
15          in areas that cause significant problems.

16      Q     Are you familiar with the prioritization calculation  
17          that the Department of Fish & Wildlife -- priority index  
18          I believe they call it -- that they make to ascribe some  
19          sort of ranking to the different barrier culverts?

20      A     Only superficially. But I know of it, yeah.

21      Q     Do you have any criticism of that particular  
22          calculation?

23      A     No.

24      Q     Now, you mentioned -- that's enough on that. You  
25          mentioned that you were likely to testify about or may

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1       testify about barrier culverts in the Hood Canal area,  
2       but that you weren't prepared today to talk about  
3       specific culverts. What do you intend to do, if  
4       anything, to gather information about the culverts in  
5       the Hood Canal area?

6       A    Speak with regional tribal biologists that are familiar  
7       with those geographies.

8       Q    Do you know who those folks would be?

9       A    I don't completely know. I have some names, but I don't  
10      know the extent of it.

11      Q    Do you anticipate doing any fieldwork yourself?

12      A    Probably not, other than potentially a site visit.

13      Q    And with respect to the Strait of Juan De Fuca area, is  
14      it the same answer?

15      A    Yes.

16      Q    Okay. I just want to go over with you, I have a few  
17      documents that were produced to us that were identified  
18      as coming from the Suquamish; and I just wanted to ask  
19      you about what they were so we have an understanding.  
20      Before I do that, let's mark this as Exhibit 7.

21                               [Deposition Exhibit No. 7 marked.]

22      Q    (By Mr. Dietrich) I want to hand to you what's been  
23      marked as Exhibit No. 7. And I'll represent to you that  
24      is a table taken from page 134 of Central Sound Hatchery  
25      Reform -- or Hatchery Scientific Review Group, and a

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## C E R T I F I C A T E

STATE OF WASHINGTON )

) SS

COUNTY OF KING )

I, Jacqueline L. Bellows, a Notary Public in and for the State of Washington, do hereby certify:

That the foregoing deposition was taken before me at the time and place therein set forth;

That the witness was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth; and that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me, and thereafter transcribed under my direction;

That the foregoing transcript is a true record of the testimony given by the witness and of all objections made at the time of the examination, to the best of my ability.

I further certify that I am in no way related to any party to this matter nor to any of counsel, nor do I have any interest in the matter.

Witness my hand and seal this 28th day of April, 2006.

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Jacqueline L. Bellows, Notary  
Public in and for the State  
of Washington, residing at  
Arlington. Commission  
expires October 19, 2006.